

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION**

**RE: THE CLAMBAKE CLUB OF NEWPORT AND
THE FRIENDS OF EASTON'S POINT, INC.
RIPDES PERMIT RI002385**

AAD NO. 09-001/WRA

DECISION AND ORDER

On November 14, 2011, the Respondent Clambake Club of Newport filed its Prehearing Conference Statement indicating "there are no Stipulations of Fact at this time". Two witnesses and three experts were listed but no objections were indicated. There were seven Exhibits listed and a note that Exhibits 8-27 (no description) were for "demonstrative and illustrative Exhibits for expert testimony." On December 20, 2011 Respondent submitted a Revised Pre-Hearing Conference Statement. Four Exhibits were stipulated to but according to Respondent, the Rhode Island Department of Environmental Management, Office of Water Resources ("OWR") did not disclose the basis for its objection to the Exhibits.

On October 5, 2012 (after the second Prehearing Conference) the Respondent Clambake Club of Newport filed a Supplemental Prehearing Memorandum along with voluminous premarked "Exhibits" and three preliminary motions: A) Motion to Identify Additional Question for Determination B) Motion for Order Estopping RIDEM from Objecting to Exhibits or Evidence, and C) Motion for Issuance of Subpoena Duces Tecum.¹ The Rhode Island Department of Environmental Management, Office of Water Resources filed an Objection to each of these motions.

¹The Prehearing Order requires Preliminary Motions be filed by the date of the Prehearing Conference.

At the second Prehearing Conference on the 19th of September, 2012 none of the Proposed Statement of Facts; Proposed Witnesses or Proposed Exhibits by both parties were finalized and submitted in accordance with Paragraph 3 the Prehearing Order of October 21, 2011. The Respondent's Supplemental Prehearing Memorandum, as submitted, pointed this Hearing Officer to attorney to attorney e-mails as evidence of the fact that certain stipulations were made by the parties late in the day on the 18th of September, 2012. Similarly, the Prehearing Memorandum of the Department of Environmental Management, Office of Water Resources ("OWR") of November 14, 2011 does not indicate what Respondent agreed to or objected to. In its second Prehearing Memorandum of December 20, 2011, the OWR agreed to stipulate to #1 through #6 of Respondent's Exhibits, but Respondent's December 20, 2011 Memorandum indicates that OWR would stipulate only to the Admission of Respondent's Exhibits #9, #20, #21, and #27. It is not the Hearing Officer's job to try and repeatedly decipher counsel's e-mails and what the parties do or do not agree to. It is both counsels' job to timely review, with each other, the proposed stipulations of fact, witnesses and exhibits prior to the Prehearing Conference and each present a coherent Prehearing Memoranda to the Hearing Officer in accordance with the Prehearing Order. It is that simple.

With respect to Respondent's three Motions, the case of **Edward A. Kent v. Rhode Island Department of Environmental Management, C.A. No. PC 10-0026, Superior Court of Rhode Island (July 20, 2011)**, addresses the standards that this Tribunal follows when reviewing evidence at a Hearing. I would point out the following relevant passage from **Kent**:

Evidentiary Issue

Finally, Kent contends that certain evidence was improperly excluded during the March hearings. Kent argues that aerial photographic evidence which was not submitted to the DEM with the Application should have been permitted

into evidence at the hearing. This evidence, Kent argues, is reliable, probative, and substantial.

Rule 401 of the Rhode Island Rules of Evidence explains that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." Further, G.L. 1956 §42-35-10 notes that in contested cases, "[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded during an administrative hearing." In the instant matter, none of the facts contained in Kent's testimony at the hearing were submitted to DEM as part of the initial Application. It would have been inappropriate for the Hearing Officer to consider this testimony. **The Hearing Officer's review is confined to information the DEM was presented with when making its initial determination.** (Emphasis added) Indeed, Hearing Officer Kerins noted that "What we try to do here is review whether the division appropriately denied the application based on what they had before them at the time." (Hr'g Tr. Vol. I, 48:21-23, March 23, 2009.) **To allow this evidence to be presented after the initial application was already reviewed would run contrary to the Hearing Officer's responsibility to review the agency record during the hearing process.** (Emphasis added)

Furthermore, neither the application nor Kent's expert's report contains the photographic evidence. **The subsequent administrative hearing was merely a review of this application process. As such, Kent clearly was prohibited from using photographic evidence which was never submitted to the DEM prior to the Application denial.** (Emphasis added) See G.L. 1956 §42-35-9(g) ("Findings of fact shall be based exclusively on the evidence and matters officially noticed"). As such, this evidence is clearly not relevant to the DEM's Decision, and was properly excluded from evidence by the Hearing Officer in accordance with state law and the Rhode Island Rules of Evidence. *See id.*

I will refrain from ruling on Respondent's three Motions as they are premature, because the Prehearing Memoranda are incomplete.

Wherefore it is hereby

ORDERED:

1. Counsel for the parties shall review the Prehearing Order dated October 21, 2011, especially the requirements in Paragraph 3, and revise their Prehearing Memoranda accordingly.

2. Counsel shall file their revised documents on or before January 30, 2013.
3. Per paragraph 5 of the Prehearing Order, failure of a party to comply with the Prehearing Order shall be grounds for the exclusion of documents or evidence pursuant to R.I.G.L. §42-17.7-5 or such action as is just.

Entered as an Administrative Order this 17th day of December, 2012.



David M. Spinella
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill 2nd FL
Providence, RI 02906
(401) 574-8600

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded, via regular mail, postage prepaid to: R. Daniel Prentiss, Esquire, One Turks Head Place, Suite 380, Providence, RI 02903; Stephen H. Burke, Esquire, Ratcliffe Harten Burke & Galamaga, LLP, 40 Westminster Street, Suite 700, Providence, RI 02903 and via interoffice mail to Marisa Desautel, Esquire, DEM Office of Legal Services, 235 Promenade Street, Providence, RI 02908 on this 17th day of December, 2012.

